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3 20th Floor
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4 Telephone: 415.433.1940
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6 JAMES J. OH, IL State Bar No. 6196413
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8 Suite 2900
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11 ANDREW J. VOSS, MN State Bar No. 0241556
(*pro hac vice* application forthcoming)
LITTLER MENDELSON
12 A Professional Corporation
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13 1300 IDS Center
Minneapolis, Minnesota 55402.2136
14 Tel: 612.630.1000
Fax: 612.630.9626
15

16 Attorneys for Defendant
NATIONWIDE MUTUAL INSURANCE
COMPANY
17

18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20

21 FRANK FOSTER, PHILLIP WAMOCK,
individually and on behalf of all others
22 similarly situated, and on behalf of the
general public,

23 Plaintiff,

24 v.

25 NATIONWIDE MUTUAL INSURANCE
COMPANY,
26

27 Defendant.
28

Case No. C3:07-CV-4928

**DECLARATION OF RICHARD H. RAHM
IN SUPPORT OF NATIONWIDE'S
MOTION TO TRANSFER VENUE**

Date: November 30, 2007
Time: 9:00 a.m.
Court: 10

Before the Honorable Susan Illston

1 I, Richard H. Rahm, declare the following:

2 1. I am a shareholder of the law firm of Littler Mendelson, P.C., counsel of
3 record in the above-entitled action. I am a member in good standing of the California State Bar, and
4 am licensed to practice before this Court. I make the following declaration in support the motion to
5 transfer venue of Defendant Nationwide Mutual Insurance Company ("Nationwide"). I make this
6 declaration based on my own personal knowledge, unless otherwise stated and, if called to testify, I
7 could and would testify competently to the matters stated herein.

8 2. Attached hereto for the Court's convenience as Exhibit A is the Declaration of
9 Teresa Wiencek, Nationwide's Vice President of Human Resources.

10 3. Attached hereto as Exhibit B is a true and correct copy of a Mapquest.com
11 inquiry I made for directions from Columbus, Ohio to San Francisco, California, which I printed.
12 Mapquest.com calculated the distance to be 2,453 miles.

13 4. Attached hereto as Exhibit C is a true and correct copy of a web page from the
14 Columbus Regional Airport Authority website, showing non-stop destinations, which I printed.

15 5. Attached hereto as Exhibit D is a true and correct copy of a web page from the
16 Des Moines International Airport website, showing non-stop destinations, which I printed.

17 6. Attached hereto as Exhibit E is a true and correct copy of a Mapquest.com
18 inquiry I made for directions from Des Moines, Iowa to San Francisco, California, which I printed.
19 Mapquest.com calculated the distance to be 1,801 miles.

20 7. Attached hereto as Exhibit F is a true and correct copy of a Mapquest.com
21 inquiry I made for directions from Cleveland, Ohio to San Francisco, California, which I printed.
22 Mapquest.com calculated the distance to be 2,463 miles.

23 8. Attached hereto as Exhibit G is a true and correct copy of a webpage from the
24 Continental Airlines website, indicating the flight time from Cleveland, Ohio to San Francisco,
25 California.

26 9. Attached hereto as Exhibit H is a true and correct copy of a Mapquest.com
27 inquiry I made for directions from Cleveland, Ohio to Columbus, Ohio, which I printed.
28 Mapquest.com calculated the distance to be 142 miles.

1 10. Attached hereto as Exhibit I is a true and correct copy of a page from the
2 United States District Courts website indicating the caseload for the Northern District of California,
3 which I printed.

4 11. Attached hereto as Exhibit J is a true and correct copy of a page from the
5 United States Courts website indicating the caseload for the Southern District of Ohio, which I
6 printed.

7 12. Attached hereto as Exhibit K are true and correct copies of the California
8 Division of Labor Standards Enforcement ("DLSE") opinion letter, dated January 7, 1993, and
9 October 5, 1998, which I printed from the DLSE website.

10 I declare under penalty of perjury under the laws of the State of California and the
11 United States that the foregoing is true and correct.

12 Executed this 16th day of October, 2007 at San Francisco, California.

13
14 
15 _____
16 RICHARD H. RAHM

17
18
19 Firmwide:83297267.1 050511.1000

EXHIBIT A

1 RICHARD H. RAHM, State Bar No. 130728
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16 Attorneys for Defendant
NATIONWIDE MUTUAL INSURANCE
COMPANY
17

18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20

21 FRANK FOSTER, PHILLIP WAMOCK,
individually and on behalf of all others
22 similarly situated, and on behalf of the
general public,

23 Plaintiff,

24 v.

25 NATIONWIDE MUTUAL INSURANCE
COMPANY,
26

27 Defendant.
28

Case No. C3:07-CV-4928

**DECLARATION OF TERESA WIENCEK
IN SUPPORT OF NATIONWIDE'S
MOTION TO TRANSFER VENUE**

Date: November 30, 2007
Time: 9:00 a.m.
Court: 10

Before the Honorable Susan Illston

1 I, Teresa Wiencek, hereby declare under perjury pursuant to 28 U.S.C. § 1746 that the
2 following is true and correct based upon personal knowledge:

3 1. I am currently employed by Nationwide Mutual Insurance Company ("Nationwide" or the
4 "Company") as the Vice President of Human Resources.

5 2. As Vice President of Human Resources, I have access to records describing the numbers
6 and locations of Nationwide's employees. I am familiar with the duties, responsibilities, and
7 reporting structure for numerous categories of employees, including Special Investigators. I am also
8 familiar with the Company's procedures related to human resources and the processing of payroll,
9 the location of personnel and payroll records, and the identities of other individuals with specific
10 knowledge regarding Nationwide's policies and procedures.

11 3. Nationwide is a national property and casualty insurance company offering a full range of
12 insurance products for its customers' homes, automobiles, and business property. Its corporate
13 headquarters is at One Nationwide Plaza, Columbus Ohio 43215-2220. I work out of the
14 Company's corporate office.

15 4. Nationwide employs a group of individuals known as Special Investigators. From 2003 to
16 the present, Nationwide has, to the best of my knowledge, employed a total of 355 Special
17 Investigators in thirty-eight states as follows: Alabama (8), Arkansas (4), Arizona (9), California
18 (36), Colorado (3), Connecticut (7), Delaware (4), Florida (32), Georgia (7), Iowa (9), Illinois (3),
19 Indiana (5), Kansas (1), Kentucky (3), Maryland (18), Michigan (13), Minnesota (3), Missouri (2),
20 Mississippi (5), North Carolina (19), Nebraska (3), New Hampshire (1), New Jersey (1), Nevada (4),
21 New York (28), Ohio (24), Oregon (4), Pennsylvania (28), Rhode Island (3), South Carolina (8),
22 Tennessee (9), Texas (19), Utah (2), Virginia (19), Vermont (1), Washington (4), Wisconsin (1) and
23 West Virginia (5).

24 5. Nationwide's general human resources and pay policies and practices are developed and
25 maintained by management and executive-level employees, from the following three departments,
26 all of which are based in Columbus: Office of Associate Relations, Performance & Rewards, and
27 PCIO Human Resources.
28

6. Payroll records are processed and kept at Nationwide's headquarters, and employee pay is prepared at and distributed from there as well.

7. Policies related to the duties, responsibilities of Special Investigators, such as their job descriptions, training materials, policies they are charged with enforcing, and documents supporting their exempt status are likewise developed and maintained at Nationwide's corporate headquarters in Columbus.

8. Nationwide management and executive-level employees who: (a) develop and prepare Nationwide's pay policies and practices; (b) calculate or approve rates of pay for non-exempt employees such as Special Investigators; (c) have knowledge of the duties, responsibilities, training, and exempt status of Special Investigators, generally work at the Company's headquarters in Columbus. For example, the following employees who work at Nationwide's corporate headquarters possess the following categories of knowledge about Special Investigators:

NAME	TITLE	SUBJECT MATTER
Teresa Wiencek	Vice President of Human Resources	Duties, responsibilities, and reporting structure for Special Investigators; procedures related to human resources and the processing of payroll, the location of personnel and payroll records; identities of individuals with specific knowledge regarding Nationwide's policies and procedures; exempt classification for Special Investigators
Kevin Hilyard ¹	Vice President of Claims (including responsibility for Special Investigation Unit)	Special Investigator duties and responsibilities
Lee S. Herman	Special Investigation Unit Officer	Special Investigator duties and responsibilities; development of training materials for Special Investigators; policies that Special Investigators are charged with enforcing
Janelle Mikusa	Human Resource Director	Duties, responsibilities, and reporting structure for Special Investigators; review of Special Investigator job titles; exempt classification for Special Investigators
Peter Hendey	Officer of Associate Relations	General human resources and pay policies; compensation-related complaints by Special Investigators
Bradley Gutcher	SIU Director	Special Investigator duties and

¹ Mr. Hilyard is currently transitioning from New York to Columbus and is expected to be situated in Columbus long before his testimony is required.

		responsibilities; review of Special Investigator job titles; training provided to Special Investigators
Richard Gandarillas	Compensation Director	Pay bands, market reference value, and job description for Special Investigators; review of Special Investigator job titles; exempt classification for Special Investigators

9. In addition, the following Company employees with knowledge about the Special Investigator job do not work at the corporate headquarters in Columbus but work much nearer to Columbus than to San Francisco:

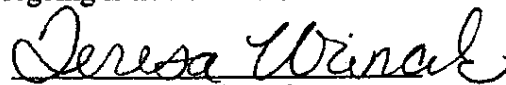
NAME and LOCATION	TITLE	SUBJECT MATTER
Ray Albertini (Cleveland, OH)	Former Head of Special Investigation Unit	Special Investigator Duties and Responsibilities; development of training materials for Special Investigators; policies that Special Investigators are charged with enforcing
Amy Spellman (Des Moines, IA)	HR Specialist	Special Investigator duties and responsibilities; review of Special Investigator job titles; exempt classification for Special Investigators
John Cordes (Des Moines, IA)	Compensation Consultant	Pay bands, market reference value, and job description for Special Investigators; review of Special Investigator job titles; exempt classification for Special Investigators
Wade Wickre (Gainesville, FL)	SIU Director	Duties, responsibilities, and reporting structure for Special Investigators; policies that Special Investigators are charged with enforcing

10. Nationwide has a regular air shuttle from Des Moines to Columbus that could provide transportation for Ms. Spellman and Mr. Cordes. It would be approximately a two and half hour drive for Mr. Albertini from Cleveland to Columbus.

1 11. Attendance at hearings and a lengthy trial in San Francisco not only will require these key
2 executives and managers to be away from their work and homes, but also would substantially disrupt
3 Nationwide's business operations and the personal schedules of the witnesses. Because these
4 individuals hold key responsibilities for the operation of the Company, scheduling time away from
5 work would be difficult because their responsibilities would have to be delegated to others, or simply
6 not performed at all.

7 12. The disruption to Nationwide's business operations and the cost of the transportation,
8 lodging and meals for its witnesses would be reduced if this case were transferred to the Southern
9 District of Ohio.

10 I declare under penalty of perjury that the foregoing is true and correct.

11 
12 Teresa Wiencek

13 Dated: 10-15-2007

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15 Firmwide:83245950.1
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EXHIBIT B



Notes:

Only text visible within note field will print.

Start: Columbus, OH US

End: San Francisco, CA US

Directions

Distance

Total Est. Time: 35 hours, 20 minutes	Total Est. Distance: 2453.80 miles
1: Start out going WEST on E STATE ST toward S HIGH ST.	<0.1 miles
2: Turn LEFT onto S HIGH ST.	0.3 miles
3: Turn RIGHT onto W MOUND ST.	0.1 miles
4: Merge onto I-70 W via the ramp on the LEFT toward DAYTON (Crossing into INDIANA).	175.2 miles
5: Merge onto I-70 W via EXIT 110B toward ST. LOUIS.	5.8 miles
6: Merge onto AIRPORT EXPY via EXIT 75 toward INDPLS. INTL. AIRPORT.	1.3 miles
7: Merge onto I-465 N / I-74 W.	5.4 miles
8: Merge onto I-74 W via EXIT 16B toward PEORIA ILL. (Crossing into ILLINOIS).	165.8 miles
9: Merge onto I-74 W via EXIT 163 toward PEORIA.	114.0 miles
10: I-74 W becomes I-80 W (Passing through IOWA- NEBRASKA- and WYOMING- then crossing into UTAH).	1249.9 miles
11: Merge onto I-80 W via EXIT 308 toward RENO / S.L. INT'L AIRPORT (Portions toll) (Passing through NEVADA- then crossing into CALIFORNIA).	734.2 miles
12: Merge onto US-101 N / CENTRAL FWY toward MISSION ST.	0.6 miles
13: Take the US-101 N / MISSION ST exit- EXIT 434A- toward G G BR.	0.1 miles
14: Turn SLIGHT RIGHT onto MISSION ST / US-101 N. Continue to follow US-101 N.	0.3 miles
15: Turn RIGHT onto MARKET ST.	<0.1 miles
16: Turn RIGHT onto 11TH ST.	<0.1 miles
17: End at San Francisco, CA US	
Total Est. Time: 35 hours, 20 minutes	Total Est. Distance: 2453.80 miles

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EXHIBIT C



COLUMBUS REGIONAL
AIRPORT AUTHORITY

Home • Port Columbus • Rickenbacker

Se

Airline & Flight Information

Airline Info

Airline Contact Info

Airlines By Concourse

Flight Info

FlyColumbus.com

Real Time Flight Information

Non-stop Destinations

Flight Schedules

Stats

Quarterly Report

Monthly Stats

Security

Security Tips

Non-stop Destinations

Port Columbus offers many daily flights to business and leisure markets throughout the [flight schedule](#).

	Air Canada Jazz	American	Continental	Delta	JetBlue	Midwest Connect	Northwest	Skybus*	Southwest
Atlanta, GA				8					
Baltimore, MD									5
Bellingham, WA (Seattle/Vancouver)								1	
Boston, MA		1		3	1				
Cancun, Mexico (weekly)									
Charlotte, NC									
Chicago, IL (Midway)									7
Chicago, IL (O'Hare)		10							
Cincinnati, OH				7					
Cleveland, OH			4						
Dallas, TX		5							
Denver, CO									
Detroit, MI							6		
Fort Lauderdale, FL				1				2	
Fort Myers, FL				1					
Greensboro, NC								1	
Hartford, CT				2					
Houston, TX			5						
Kansas City, MO						2		1	
Las Vegas, NV									2
Los Angeles, CA (LAX)				1					
Los Angeles, CA									

(Burbank, CA)								2	
Memphis, TN							3		
Miami, FL		1							
Milwaukee, WI						4			
Minneapolis, MN							3		
Nashville, TN									2
New York, NY (Kennedy)				4	4				
New York, NY (LaGuardia)		4		4					
New York, NY (Newark)			6						
Oakland, CA								1	
Orlando, FL				3					3
Philadelphia, PA									3
Phoenix, AZ									1
Portsmouth, NH (Boston)								2	
Raleigh/Durham, NC		2							
Richmond, VA								1	
San Diego, CA								1	
Salt Lake City, UT				1					
Springfield/Chicopee, MA (Hartford)								1	
St. Augustine, FL (Jacksonville)								1	
St Louis, MO		4							1
Tampa/ St. Petersburg, FL				1					2
Toronto, Canada	3								
Washington, DC (Dulles)									
Washington, DC (National)				2					
Totals	3	27	15	38	5	6	12	14	26
	Air Canada Jazz	American	Continental	Delta	JetBlue	Midwest Connect	Northwest	Skybus*	Southwest

SKYBUS NOTE:

Four new nonstop flights from Columbus - effective December 5.

New Cities:

- Chattanooga
- Gulfport-Biloxi/New Orleans Area
- Milwaukee
- Punta Gorda/Ft. Myers (two flights daily)

Now two flights a day effective December 17:

- Jacksonville/Daytona Beach (St. Augustine)

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Doing Business with CAA | Noise Program | Employment Opportunities | Contact Us |
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EXHIBIT D

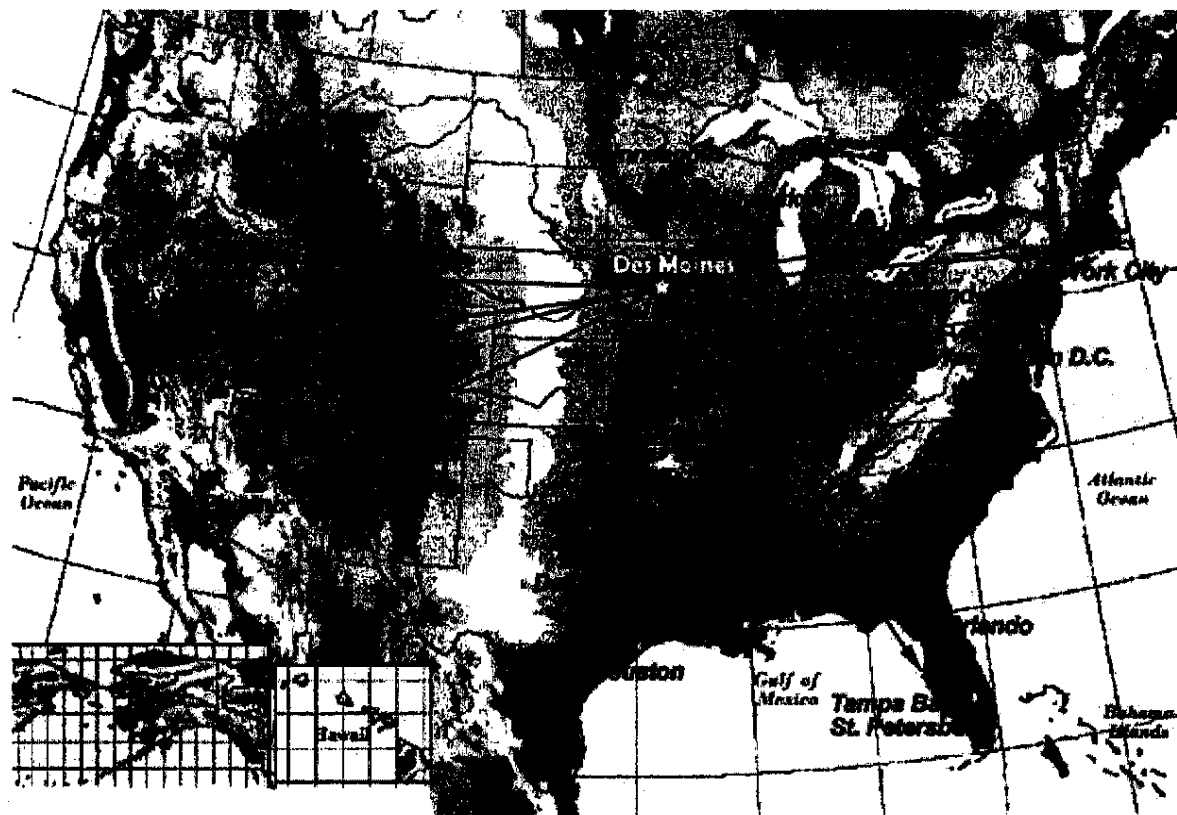


Travel Info

DES MOINES
INTERNATIONAL

Home Parking Weather Flight On Time Travel Info Business Services Community Info What's New About Us

"19" Non-Stop Destinations



- Atlanta
 - 3 non-stops per/day to Atlanta on ComAir/Delta Starting in September '06, 4 flights per/day!
- Chicago
 - 6 non-stops to Chicago O'Hare Field Sunday-Friday and 5 on Saturday with American Eagle, 6 non-stops daily to Chicago O'Hare on United Airlines
- Cincinnati
 - 5 non-
- Milwaukee
 - 3 daily non-stops Monday-Friday, 2 on Saturday/Sunday all with Midwest Airlines
- Minneapolis
 - 9 non-stops per-day Sunday-Friday, 8 on Saturday, all on Northwest Airlines
- New York City
 - 1 non-stop per/day (except Sunday) on American Eagle
- Orlando

- | | |
|---|--|
| stops per/day on
ComAir/Delta | One nonstop |
| • Cleveland | 4-days per/week on
Allegiant Air |
| 2 non-stops per day on
Continental Airlines
starting June 2008 | • Phoenix |
| • <u>Dallas</u> | 2 non-
stops everyday on U S
Airways |
| 5 | • <u>Salt Lake City</u> |
| non-stops Sunday-
Friday, and 4 non-stops
Saturday on American
Eagle | 1 non-stop a day on
Delta/SkyWest |
| • <u>Denver</u> | • St. Louis |
| 6 | 3 non-
stops Sunday-Friday, 2
on Saturday with
American Eagle |
| non-stops per/day on
United Airlines | • <u>Tampa Bay/</u> |
| • Detroit | St. Petersburg |
| 4 | 2 non-stops Wednesday
and Sundays on
Allegiant Air |
| non-stops per/day on
Northwest | • <u>Washington DC</u> |
| • <u>Houston</u> | 1 non-stop per/day on
Northwest Airlines |
| 3 non-
stops per/day on
Continental Airlines | |
| • Las Vegas | |
| 1 non-
stop per/day on Allegiant
Air 4-days per week,
Thursday- Friday and
Sunday - Monday. | |
| • <u>Memphis</u> | |
| 3 non-
stops per/day on
Northwest Airlines | |

EXHIBIT E

**Notes:**

Only text visible within note field will print.

Start: Des Moines, IA US**End: San Francisco, CA US****Directions****Distance****Total Est. Time:** 25 hours, 17 minutes**Total Est. Distance:** 1801.50 miles

- 1:** Start out going SOUTH on PENNSYLVANIA AVE toward E UNIVERSITY AVE. 0.1 miles
- 2:** Turn SLIGHT RIGHT. 0.1 miles
- 3:** Merge onto I-235 W. 9.1 miles
- 4:** I-235 W becomes I-80 W (Passing through NEBRASKA and WYOMING- then crossing into UTAH). 1056.4 miles
- 5:** Merge onto I-80 W via EXIT 308 toward RENO / S.L. INT'L AIRPORT (Portions toll) (Passing through NEVADA- then crossing into CALIFORNIA). 734.2 miles
- 6:** Merge onto US-101 N / CENTRAL FWY toward MISSION ST. 0.6 miles
- 7:** Take the US-101 N / MISSION ST exit- EXIT 434A- toward G G BR. 0.1 miles
- 8:** Turn SLIGHT RIGHT onto MISSION ST / US-101 N. Continue to follow US-101 N. 0.3 miles
- 9:** Turn RIGHT onto MARKET ST. <0.1 miles
- 10:** Turn RIGHT onto 11TH ST. <0.1 miles
- 11:** End at San Francisco, CA US

Total Est. Time: 25 hours, 17 minutes**Total Est. Distance:** 1801.50 milesAll rights reserved. Use Subject to License/Copyright

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EXHIBIT F



Notes:

Only text visible within note field will print.

Start: Cleveland, OH US

End: San Francisco, CA US

Directions

Distance

Total Est. Time: 35 hours, 29 minutes	Total Est. Distance: 2463.08 miles
1: Start out going SOUTHEAST on W 3RD ST toward W SUPERIOR AVE / US-20 / US-322 / US-6.	<0.1 miles
2: Turn LEFT onto W SUPERIOR AVE / US-20 / US-322 / US-6.	<0.1 miles
3: Turn RIGHT onto PUBLIC SQ / US-20 E.	<0.1 miles
4: Turn RIGHT onto ONTARIO ST / US-422 / OH-14 / OH-8 / OH-87. Continue to follow US-422 / OH-14 / OH-8 / OH-87.	0.5 miles
5: Merge onto I-90 W toward I-71.	1.0 miles
6: Merge onto I-90 W via EXIT 170B toward TOLEDO (Portions toll) (Crossing into INDIANA).	306.2 miles
7: Merge onto I-80 W via EXIT 21 toward IN-51 S (Portions toll) (Crossing into ILLINOIS).	169.4 miles
8: Merge onto I-280 W (Crossing into IOWA).	26.6 miles
9: Merge onto I-80 W via the exit on the LEFT toward DES MOINES (Passing through NEBRASKA and WYOMING- then crossing into UTAH).	1223.3 miles
10: Merge onto I-80 W via EXIT 308 toward RENO / S.L. INT'L AIRPORT (Portions toll) (Passing through NEVADA- then crossing into CALIFORNIA).	734.2 miles
11: Merge onto US-101 N / CENTRAL FWY toward MISSION ST.	0.6 miles
12: Take the US-101 N / MISSION ST exit- EXIT 434A- toward G G BR.	0.1 miles
13: Turn SLIGHT RIGHT onto MISSION ST / US-101 N. Continue to follow US-101 N.	0.3 miles
14: Turn RIGHT onto MARKET ST.	<0.1 miles
15: Turn RIGHT onto 11TH ST.	<0.1 miles
16: End at San Francisco, CA US	
Total Est. Time: 35 hours, 29 minutes	Total Est. Distance: 2463.08 miles

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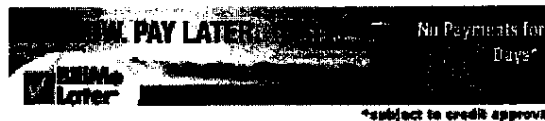
EXHIBIT G

SEARCH FLIGHTS → CHOOSE FLIGHTS → **TICKET DETAILS** → TRAVELER INFORMATION → COMPLETE PURCHASE

Review Ticket Details

Price Details:

1 Adults (age 18 to 64) \$434.00
 Additional Taxes/Fees \$20.80
Total Price \$454.80



Flight Details:

Depart:
9:00 a.m.
 Wed., Oct. 31, 2007
 Cleveland, OH (CLE)

Arrive:
11:14 a.m.
 Wed., Oct. 31, 2007
 San Francisco, CA (SFO)

Travel
 Time:
**5 hr 14
 mn**

OnePass Miles/
 Elite Qualification:
2,161 /100%

Flight: **C0555**
 Aircraft: **Boe**
 Fare Class: **E**
 Meal: **Snack**
No Special M

Depart:
12:20 p.m.
 Wed., Nov. 7, 2007
 San Francisco, CA (SFO)

Arrive:
8:04 p.m.
 Wed., Nov. 7, 2007
 Cleveland, OH (CLE)

Travel
 Time:
**4 hr 44
 mn**

OnePass Miles/
 Elite Qualification:
2,161 /100%

Flight: **C0254**
 Aircraft: **Boe**
 Fare Class: **E**
 Meal: **Snack**
No Special M

> [Change Flights](#) or [Start New Search](#)

Rules and Restrictions:

- **This ticket is non-refundable. If you cancel your reservation prior to scheduled depart subject to applicable rules, change the ticket for travel up to one year after the ticket issued; otherwise the ticket has no value.**
- Read the [penalty rules](#) for changes and cancellations associated with this fare.
- Read the [complete rules and restrictions](#) applicable for this fare.
- Read the [Electronic Travel Certificate terms and conditions](#) (if applicable).
- Non-Elite OnePass members traveling on Y, H, K, N, or B (or equivalent) fares are eligible for m upgrades within or between the 48 contiguous U.S., Alaska and Canada.
- The free baggage allowance is two checked bags not to exceed 50 lbs (22.7 kg) [70 lbs (32 kg) customers] and 62 linear inches (157 cm) (total length + width + height) per piece. [Review our checked baggage policy](#)
- [Review our complete baggage policy](#)

☐ **I accept the fare rules associated with this non-refundable ticket. Any changes made to this result in additional fees.**

OnePass Members

To continue the booking process using your saved preferences, please sign in to your account now. See [benefits](#) of signing in to your account.

OnePass Number or Username:

PIN or Password:

Don't know your PIN?

Please see [Forgot Your PIN](#).

Continue without Signing In

Click continue below to proceed with the bc process.

You'll have the opportunity to enroll in our flyer program at the end of the booking prc wish.

If you are a OnePass member and do not sign in to your account, you can enter your number on the next page for mileage credit.

☐ Remember Me☐ Security Info

Note: OnePass frequent flyer mileage information is provided as a convenience to OnePass members. Elite miles is the percentage of OnePass Elite status when booked on continental.com. Actual flown miles will be posted to your account. Fare class, Elite and other promotional bonuses are the totals listed. A minimum of 500 OnePass miles is earned for flights less than 500 miles in distance. For Amtrak train segments 250 OnePass Economy Class and 325 OnePass miles for First Class.

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EXHIBIT H



Start: Cleveland, OH US

End: Columbus, OH US

Notes:

Only text visible within note field will print.

Directions

Distance

Total Est. Time: 2 hours, 19 minutes

Total Est. Distance: 142.35 miles

- 1:** Start out going SOUTHEAST on W 3RD ST toward W SUPERIOR AVE / US-20 / US-322 / US-6. <0.1 miles
- 2:** Turn LEFT onto W SUPERIOR AVE / US-20 / US-322 / US-6. <0.1 miles
- 3:** Turn RIGHT onto PUBLIC SQ / US-20 E. <0.1 miles
- 4:** Turn RIGHT onto ONTARIO ST / US-422 / OH-14 / OH-8 / OH-87. Continue to follow US-422 / OH-14 / OH-8 / OH-87. 0.5 miles
- 5:** Merge onto I-90 W toward I-71. 1.0 miles
- 6:** Keep LEFT to take I-71 S toward COLUMBUS. 139.3 miles
- 7:** Take the BROAD ST / US-40 exit- EXIT 108B. 0.1 miles
- 8:** Turn RIGHT onto E BROAD ST / US-40 / US-62 / OH-16. 0.7 miles
- 9:** Turn LEFT onto S 3RD ST / US-33 E / US-23 S / US-62 S / OH-3 S. 0.1 miles
- 10:** Turn RIGHT onto E STATE ST. <0.1 miles
- 11:** End at Columbus, OH US

Total Est. Time: 2 hours, 19 minutes

Total Est. Distance: 142.35 miles

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EXHIBIT I

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

					12-MONTH PERIOD ENDING SEPTEMBER 30							
CALIFORNIA NORTHERN					2006	2005	2004	2003	2002	2001	Numerical Standing	
OVERALL CASELOAD STATISTICS	Filings*				8,683	6,362	6,727	6,919	7,887	6,841	U.S.	Circuit
	Terminations				6,983	6,966	6,471	7,094	6,675	6,069		
	Pending				8,157	6,557	7,267	7,567	7,958	6,928		
	% Change in Total Filings	Over Last Year			36.5						4	1
		Over Earlier Years				29.1	25.5	10.1	26.9	10	2	
Number of Judgeships					14	14	14	14	14	14		
Vacant Judgeship Months**					.0	.0	.0	3.1	12.0	3.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	620	455	480	494	563	489	11	3		
		Civil	558	390	413	424	510	439	6	2		
		Criminal Felony	37	39	44	47	42	50	82	12		
		Supervised Release Hearings**	25	26	23	23	11	-	36	12		
	Pending Cases		583	468	519	541	568	495	12	2		
	Weighted Filings**		621	543	581	631	598	610	5	2		
	Terminations		499	498	462	507	477	434	28	5		
	Trials Completed		8	10	10	11	11	11	91	14		
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	11.2	12.6	11.1	11.7	11.8	10.1	75	11		
		Civil**	7.4	9.8	8.2	10.6	9.5	9.1	11	3		
	From Filing to Trial** (Civil Only)		25.0	28.0	22.5	30.3	23.5	22.7	41	5		
OTHER	Civil Cases Over 3 Years Old**	Number	528	530	430	377	475	335				
		Percentage	7.3	9.5	6.9	5.7	6.7	5.6	60	7		
	Average Number of Felony Defendants Filed Per Case		1.5	1.5	1.4	1.5	1.4	1.5				
	Jurors	Avg. Present for Jury Selection	59.09	55.21	61.19	65.00	66.42	60.46				
		Percent Not Selected or Challenged	43.2	31.0	48.9	40.9	47.2	42.2				

2006 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	7812	128	2118	1540	105	23	487	577	481	464	745	105	1039
Criminal*	507	16	58	134	70	89	18	28	8	9	15	27	35

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.

** See "Explanation of Selected Terms."

EXHIBIT J

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

				12-MONTH PERIOD ENDING SEPTEMBER 30							
OHIO SOUTHERN				2006	2005	2004	2003	2002	2001	Numerical Standing	
OVERALL CASELOAD STATISTICS	Filings*			3,066	3,223	3,466	3,254	3,482	3,101	U.S.	Circuit
	Terminations			3,296	3,392	3,177	3,292	3,224	3,192		
	Pending			3,422	3,637	3,788	3,501	3,568	3,392		
	% Change in Total Filings	Over Last Year		-4.9						52	5
		Over Earlier Years		-11.6	-5.8	-12.0	-1.1		53	5	
Number of Judgeships				8	8	8	8	8	8		
Vacant Judgeship Months**				7.0	10.0	.2	5.5	14.6	.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	383	403	434	407	435	388	61	7	
		Civil	297	319	358	338	363	347	52	7	
		Criminal Felony	62	60	56	48	46	41	56	6	
		Supervised Release Hearings**	24	24	20	21	26	-	39	2	
	Pending Cases			428	455	474	438	446	424	30	3
	Weighted Filings**			437	483	516	479	497	450	45	4
	Terminations			412	424	397	412	403	399	53	6
	Trials Completed			20	21	19	17	16	11	42	6
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	9.0	8.0	7.6	7.4	7.7	7.2	48	4	
		Civil**	12.6	11.3	12.1	11.9	11.3	11.4	83	6	
	From Filing to Trial** (Civil Only)		27.0	32.0	26.0	25.7	23.0	25.7	54	6	
OTHER	Civil Cases Over 3 Years Old**	Number	240	198	212	201	206	244			
		Percentage	8.3	6.4	6.4	6.4	6.4	7.9	67	9	
	Average Number of Felony Defendants Filed Per Case			1.3	1.6	1.5	1.4	1.4	1.4		
	Jurors	Avg. Present for Jury Selection	50.60	44.80	27.75	31.92	38.70	32.86			
		Percent Not Selected or Challenged	48.6	34.3	33.3	37.2	33.4	33.8			

2006 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	2374	232	97	295	55	20	291	313	164	114	568	19	206
Criminal*	490	13	125	11	108	102	24	31	21	16	3	8	28

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.

** See "Explanation of Selected Terms."

EXHIBIT K

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

455 Golden Gate Avenue, Room 3166

San Francisco, CA 94102

(415) 703-4150

J. THOMAS CADELL, JR., Chief Counsel



January 7, 1993

William Cochran-Bond, Esq.
Proskauer, Rose, Goetz & Mendelsohn
2121 Avenue of The Stars, Suite 2700
Los Angeles, CA 90067-5010

Re: Exempt Employees - "Salary Basis Test"

Dear Mr. Cochran-Bond:

The Labor Commissioner has asked me to respond to your letter of November 2, 1992, which was received in this office by Facsimile on December 7, 1992.

In your letter you discuss the use of the federal "salary basis test" which is utilized by the U.S. Department of Labor to determine exemptions under the Fair Labor Standards Act and the applicability of that test to California overtime requirements. You correctly point out in your letter that there is no equivalent test under state law. Thus, the result of the *Abshire* case does not affect the enforcement of the California Industrial Welfare Orders. Having said this, however, we feel that an explanation as to why this is so is in order.

We feel that your letter raises questions which many California employers have puzzled over. This is particularly true since the adoption by the IWC of the "Learned and Artistic" exemption in some of the Orders. For that reason, the Division will use your letter as a vehicle to clarify the position of the Division of Labor Standards Enforcement regarding exemptions.

The question of the applicability of the federal caselaw (and in some instances, the federal regulations¹) dealing with the issue

¹ In the case of *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, the court noted that California's overtime laws are "closely modeled after (although they do not duplicate) section 7(a)(1) of the Fair Labor Standards Act." The court noted that when California laws are patterned on federal statutes and that the federal court authorities interpreting those federal statutes provide persuasive guidance to state courts. However, the same court noted that "federal guidelines" (i.e., regulations) may not be considered definitive. See discussion of this issue, *infra*.

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of administrative, managerial and professional exemptions to the California IWC Orders is frequently encountered. As we will explain, the federal law differs substantially from the state law in this area. However, we must emphasize that, of course, the California employer must, however, comply with the more stringent law.

Applicable Language

Federal Law

The Fair Labor Standards Act provides, at 29 U.S.C. §213(a)(1), that the minimum wage and overtime provisions of the Act (29 U.S.C. §§ 206 and 207) do not apply with respect to:

Any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)..."

State Law

The California Industrial Welfare Commission Orders (Section 1(B)(1))² provides the following exemption for administrative, executive or professional employees:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily

² There are fifteen separate Orders and these orders do not always follow the exact numerical order from one to another.

intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration³ is not less than (\$900 or \$1150) per month...

As you can see, the language of the FLSA differs substantially from that of the IWC Orders. The FLSA simply requires that the employee be "employed in the capacity" of an executive while the IWC Orders require that (in addition to the salary [remuneration] test [\$900 or \$1150]) the person be "engaged in work which is primarily⁴ intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment." However, probably the most important feature of the FLSA which sets it apart from the provisions of the IWC Orders is the fact that Congress allowed the Secretary of Labor to "define and delimit" the terms used⁵. In California, on the other hand, the IWC has defined the terms and the

³ The term used by the IWC to define the amount the employee must be compensated in order to qualify for the exemption is "remuneration". Historically, the DIW (the predecessor agency mandated to enforce the IWC Orders until consolidated with DLLE in 1975) and DLSE have construed the use of this word to mean that the Commission did not intend to set a "salary" which must be paid in cash, but intended to include all wages and benefits not required by law. As an example, if an employee receives a salary of \$600.00 per month in cash wages and the use of an apartment which has a value of \$600.00 per month, the employee would meet the "remuneration" test. (If the employee is a resident apartment manager, consideration must be given to the provisions of Labor Code §1182.8.)

⁴ Section 2 of the IWC Orders defines the word "primarily" to mean "more than one-half". Note that the word "primary" is used in the federal regulations but is not defined. The federal courts have defined "primary" for purposes of the federal regulations according to its dictionary definition as "principal" or "chief" and held it did not seem appropriate to attach a time criterion to the word as the regulations had done.

⁵ The Commission has provided permission to the DLSE to follow the rules adopted by the Secretary of Labor in one area. The IWC in the orders promulgated since July of 1988 has chosen to add the category "learned and artistic" to the list of exempt occupations as an adjunct to the "professional" exemption which already existed. The Commission noted in its "Statement of Basis" that the addition of this language [learned and artistic] "would permit, but would not be limited to, use of the federal guidelines for purposes of interpretation" of the category [professional]. The "learned and artistic" category has nothing to do with the managerial category, however, and the IWC has not provided for the use of the federal "guidelines" in other than the "professional/learned and artistic" category.

provisions of Labor Code §1198.4 simply provide the Division with the authority to interpret the orders for enforcement purposes. (See, *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 249)

The Federal Enforcement Policy

In response to the directive of Congress contained in section 29 U.S.C. §213(A)(1), the Department of Labor has promulgated regulations at 29 C.F.R. §541 et seq. which "define" the terms executive, administrative and professional and "delimit" those terms. For instance, the federal regulations begin by describing an individual "employed in a bona fide executive...capacity" as one:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of (sic) subdivision thereof; ...

The federal regulations contain both a "long test" and a "short test" for determining the exempt status of workers. The "long test" has a threshold salary requirement (\$155.00 per week) and has three requirements in addition: (1) the employee must have authority to hire or fire (or their recommendation in this regard must be given weight); (2) they must customarily and regularly exercise discretionary powers, and (3) they must not devote more than 40 per cent of their time to activities not "closely related" to their management duties. The short test looks initially to an enhanced salary requirement (at least \$250.00 per week) and requires only that (1) the "primary duty" of the employee be managerial, and (2) the employee must regularly direct the work of at least two other employees. Under this test the allocation of the employee's time is not in issue.

The use of the differing criteria depending on the amount of the salary paid was a decision made by the DOL based upon enforcement costs.⁶ On the other hand, the IWC has no salary test (only a "remuneration" test) in the Orders, and DLSE has not been given discretion to set a salary test as has the Department of Labor.

⁶ The court addressed this issue in another case involving the same employer: *Donovan v. Burger King* 675 F2d 516, 520 (2nd Cir.1983) and held that "where salary is low and a substantial amount of time is spent on non-exempt work, the inference that the employee is not an executive is quite strong and the savings in enforcement costs afforded by the mechanical test may offset whatever is lost in accuracy in aberrational cases."

Therefore, it is impossible to utilize the federal regulations to determine whether one is exempt under the IWC Orders. However, even if we were not faced with the problem of the salary test to determine which criteria should be used, the primary consideration under either federal test is the "primary duty" of the worker while under the IWC Orders the emphasis is upon the type of work the employee is "engaged in".

The "primary duty" test as defined by the federal courts is best summed up by the language in *Donovan v. Burger King*, 672 F.2d 221, 226 (1st Cir.1982), which held that "an employee can manage while performing other work, and [that] this other work does not negate the conclusion that his primary duty is management." That same court, *Donovan v. Burger King* 672 F.2d at 226, stated that "one can still be 'managing' if one is in charge, even while physically doing something else." (See also *Guthrie v. Lady Jane Collieries, Inc.* 772 F.2d 1141, 1145) The *Burger King* court also concluded that the use of the word "primary" in the federal regulations was misleading for the reason that the dictionary definition of "primary" is "principal" or "chief" and it did not seem appropriate to attach a time criterion to the word as the regulations had done. (*Burger King, supra*, 672 F.2d at 226)⁷

The IWC Orders

Unlike the federal regulations which look to the "primary duty" of the employee, the IWC Orders emphasize the type of work the employee is "primarily engaged in". In addition, the IWC adopted a definition of the word "primarily" to mean "more than one-half the employee's work time". While the IWC did not define the term engage in, the dictionary definition is: "[T]o involve oneself or become occupied; (American Heritage Dictionary, New College ed., p. 433) Thus, the term "primary duty" used by the federal government in the enforcement of the Fair Labor Standards Act has no relationship to the term "engaged in" used by the DLSE in enforcing the IWC Orders.

⁷ Even the federal regulations make it clear that "time" is not the only standard which may be used to determine "primary duty". The regulations set out a very broad meaning (in fact, subjective), of the term "primary duty" which discusses an employee who spends more than 50 per cent of his time in "production or sales work" but, while so engaged, supervises other employees and does other managerial work. (29 C.F.R. §541.103) As will be explained later, the DLSE policy is to give credit for all time spent in managerial work; but not to credit time toward managerial time when the actual work the employee is "engaged in" at the moment is production or sales.

As the federal courts have pointed out, an employee whose "primary duty" is management may "manage" "even while physically doing something else" and such an arrangement would not be inconsistent with the federal regulations. On the other hand, one may not be "engaged in" activities which are, for instance, managerial, as required by the IWC Orders, while at the same time "doing something else"; for it would be impossible "to involve oneself or become occupied" with managerial work while performing other duties. In other words, the IWC Orders require us to ascertain the type of work the individual is actually doing (e.g., "managerial" or "production or sales") and count the time on either side of the ledger.

The Division takes the position that any time related to management which may be logically separated from production or sales time must be counted toward the managerial duties of the employee. Managerial duties must include supervision of at least two other employees with either the concomitant right to hire and fire or the right to recommend hiring and firing where such recommendation is given serious consideration. The "management" employee must regularly exercise discretion and, unlike the federal regulations, must also exercise independent judgment.⁸

Discretion implies that one has a choice to make but does not mean that the employee must enjoy the right to deviate from policies or procedures which allow for some discretion. However, if those policies and procedures so tightly control the manager's ability to make independent judgments, the manager will not be exempt.

Management duties may vary in specifics depending on the industry or the job classification, but they must include the above cited minimums. Some examples of management duties which DLSE will accept are:

Interviewing and selecting employees, training employees; setting of rates of pay and hours of work; directing the work of employees; maintaining production of sales records; appraising work performance; recommending changes in status; handling complaints; disciplining employees; planning work schedules; determining techniques to be used; apportioning work among workers; determining the type of materials, supplies, machinery or tools to be used; controlling the flow and distribution of materials, merchandise or supplies, and providing for the safety of the employees and their property.

⁸ The federal regulations require the exercise of "independent judgment" in order to qualify for exemption as an administrative employee, but, unlike the IWC Orders, there is no requirement that the employee exercise "independent judgment" to qualify for the executive (managerial) exemption.

The above list is not inclusive or exclusive. It must also be noted that one may be employed to perform some of the above while not employed as a manager or supervisor. For instance, some of the duties described above may be done by employees with no supervisory authority, such as personnel specialists or expeditors. While those employees may (or may not) meet the criteria for exemption as administrative employees, they would not be exempt under the executive classification.

Any time the employee is "engaged in" such management duties must be counted. For instance, if the employee is employed as a manager of a shoe store, there are instances where the manager may, as a training tool, involve himself in the sale process. Such time should be counted toward managerial duties if, and only if, the trainee is not engaged in sales to another customer or other activities at the same time. If the sales work is truly training, the trainee should obviously be attentive to the training. The trainee would learn little if he were engaged in another sale to another customer at the same time. Such work would not be training, but the manager would be "engaged in" sales work.

The same situation could very well occur in almost any work setting. Explaining or demonstrating the work process to a single worker or a group of workers whose attention is directed to the demonstration would constitute training which may be a part of management duties.⁹

Any time taken away from production or sales work and devoted to any managerial work (no matter how short the time span may be) is considered managerial work and must be counted. However, the employee may not be "engaged in" two jobs at once. Thus, a worker employed in a manager position who simply answers a question while continuing to perform production or sales work is not "engaged in" managerial duties, but is "occupied or involved in" production work. On the other hand, the time that such an employee clearly disengages from the production or sales work to "engage in" managerial duties will be counted toward managerial duties.

Each particular situation must be decided on its own facts and this letter is designed to explain the overall policy of the DLSE in this regard. The important thing to remember is that the federal caselaw which interprets the Act (not the federal regulations or the federal cases interpreting those regulations) may be used as authority in construing the IWC Orders. (*Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546) Since the federal cases in

⁹ If the employee is engaged as a trainer, however, such duties are simply part of the job classification and may not be counted toward managerial duties unless the other criteria involving supervision are present.

this area such as *Donovan v. Burger King, supra*, are not construing the Act, but are construing the regulations, they are not on point. Additionally, it must be made clear that imposition of any "salary test" other than the "remuneration" test found in the Orders, is beyond the jurisdiction of the DLSE and, thus, is beyond the jurisdiction of the California courts.

Administrative Employees

Again, in determining the exemption status under the administrative category, the key phrase is "engaged in" and not, as under the federal regulations, "primary duty" (29 C.F.R. §541.2(a)). With this exception, the DLSE accepts the general definition of "administrative duties" set out by the DOL at 29 C.F.R. §541.2. Generally, administrative work must be nonmanual, related to management policies or general business operations of the employer or the employer's customers and must involve the customary and regular exercise of discretion and independent judgment. The Department of Labor's regulations discuss the administrative exemption in detail at 29 C.F.R. §541.201 through §541.208 and the DLSE adopts those definitions. However, it must be noted that certain of the regulations not contained within the above cited sections are inconsistent with the IWC Orders and cannot be relied upon. For instance, §541.211 through §541.214 discuss the salary test requirements which the DOL has adopted for determining whether to use its "short test" or the "long test". Also, the language of §541.215 is not consistent with the IWC Orders because the Orders do not address "academic administrative personnel" and, under the IWC Orders, the "profession" of teachers is subject to different rules and definitions. (For instance, see IWC Order 5-89, Section 1(B)(2) and Section 2(N) defining the word "teaching".)

"Titles" may be used by some employers to designate workers as administrative employees who are then paid on a "salary" basis without regard to overtime. However, it is important to ascertain the duties of the worker (and not simply the title) for purposes of categorization. For example, an assistant to a low level manager may have duties which require the exercise of little or no independent judgment or discretion. Such employees are simply carrying out day-to-day routine functions. On the other hand, an administrative assistant to a top level manager of a large firm may deal with line managers on an equal footing and be involved in framing and carrying out policy matters of significance. It is important to distinguish between these two examples for purposes of determining exemptions.

Professional Employees

The IWC has adopted nine specific professions, licensed or certified in California, which are exempt. The DLSE policy had historically been that only the professional listed in those nine licensed or certified professions could be considered for that exemption. For instance, only doctors, not nurses or other health care workers could be included; and only lawyers, not court reporters or other legal support personnel could be included in the exemption.

However, the IWC has now adopted the "learned or artistic" category in Orders 4, 5, 9 and 10. The IWC in its "Statement of Basis" in those Orders indicated that the DLSE would be permitted to use, but not be limited to the use, of the Federal Regulations for purposes of interpretation. The DLSE has decided to use these guidelines which are applicable and consistent with the IWC Orders. (See Interpretive Bulletin 89-2). The guidelines which may be used are contained at 29 C.F.R. §541.302 through §541.308. Where the regulations are inconsistent with the IWC Orders, however, they cannot be utilized. (For example, §541.304 dealing with the term "primary duty" which, as discussed above, is inconsistent with the term "engaged in" used in the IWC Orders, and §541.309, et seq. which deal with non-exempt work and salary tests¹⁰)

The "learned or artistic" category is designed to broaden the "professional" exemptions available under the IWC Orders. The intent was to exclude those employees in work classifications not in need of the protections offered by the Orders, without requiring a listing of each such classification.

Use of the Federal Regulations

As detailed above, the federal regulations may only be relied upon when either the IWC has approved such use, and/or the DLSE policy has approved such use.¹¹ The federal regulations, in many

¹⁰ One of the most striking examples of the difference between the IWC Orders and the enforcement of the federal Fair Labor Standards Act is the fact that there is no "remuneration" or salary test for the professional employee exemption under the IWC Orders while under the regulations adopted by the Department of Labor to enforce the FLSA there is a salary test for professional status which is actually higher than the salary test for executive and administrative.

¹¹ As noted above, the IWC in its Statement of Basis has specifically authorized (but not required) the DLSE to adopt the "federal guidelines" (regulations) for purposes of enforcement of the newly adopted "learned

instances, actually involve new laws which the FLSA authorizes the Secretary of Labor to enact. Examples are the definitions of executive, administrative and professional which add salary tests not contained in the FLSA. Obviously, the State of California does not contemplate deferring its law-making authority to the U.S. Secretary of Labor; however, if the federal regulations were required to be followed, that would be the result.¹² A recent development is the amendment of the Fair Labor Standards Act which provides that the Secretary of Labor is directed to adopt regulations which would exempt computer programmers from the overtime requirements of the Act if the regular hourly wage paid to the computer programmers is at least six and one-half times the federal minimum wage. This provision obviously has no effect in California inasmuch as the law does not permit the DLSE to adopt any such "salary test".

and artistic" category. In addition, the DLSE has adopted the language used in some of the Regulations adopted by the DOL where, and to the extent, that such language is appropriate. However, as explained above, while some of the criteria contained in the Regulation may be helpful, other portions of the Regulation would not be appropriate because it is based upon provisions in the FLSA which are not contained in the IWC Orders.

¹² There is one instance where Division policy has historically recognized that a portion of the IWC Order was closely patterned on a federal regulation and the DLSE adopted an enforcement policy which reflected that fact. Section 3(G) of Order 9 provides:

"The daily overtime provision of subsection (A) above shall not apply to ambulance drivers and attendants scheduled for twenty-four (24) hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours. The employer shall provide adequate dormitory and kitchen facilities for employees on such a schedule."

In the case of *Monzon v. Schaeffer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, the Second District Court of Appeal in what must be described as an unusual reading of the law, agreed with the DLSE that the law was "patterned" on the federal law, but disagreed with the Division's position that the clear language of the order required that the agreement to exclude the sleep time must, under the California law, be in writing. As the dissent points out, the court's decision "overlooks the well-settled, common-sense principle that federal interpretations of the federal labor laws are not controlling in any sense where, as here, the language and intent of the IWC Orders differ in language and intent from the federal statutes and regulations." (Citing to *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239.

Again, the Division emphasizes that the California employer must comply with the more stringent law, federal or state, in this area. As you can see, there are times when the federal law may impose a greater burden on the employer than does the California law. In those instances, compliance with the federal law and regulations is required.

We hope that this explanation is of assistance to you and your client. If you have any further questions, please contact the nearest District office of the Division of Labor Standards Enforcement District office.

Yours truly,

H. THOMAS CADELL, JR.

Chief Counsel

c.c. Victoria Bradshaw, State Labor Commissioner

Simon Reyes, Assistant Labor Commissioner

Nance Steffen, Regional Mgr., Hdqtrs.

STATE OF CALIFORNIA

PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

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October 5, 1998

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SENT BY MAIL AND FAXED
TO (415) 434-0513

Re: Applicability of the Administrative Exemption
to Insurance Company Claims Representatives

Dear Ms. Berman:

This is in response to your letter of September 14, 1998, requesting an opinion as to whether insurance company claims representatives are covered by the overtime provisions of Industrial Welfare Commission Wage Order 4-98 [Cal. Code of Regulations § 11040, hereinafter referred to as IWC Order 4]¹ or whether said employees are exempt as "persons employed in administrative capacities" as described in Section 1 of the Wage Order.²

¹ Sections 3 ("Hours and Days of Work") and 11("Meal Periods") of Wage Order 4 were amended, effective January 1, 1998; other amendments mandated by increases in State and Federal minimum wage statutes were also incorporated into the reprinted Wage Order, which amended Wage Order 4-89. There were no changes to Sections 1 and 2, which include the language relevant to your inquiries on exemptions.

² The inclusion of the administrative exemption in IWC Wage Orders dates back to 1947. The minutes of an IWC meeting on March 7, 1947 state at p. 3 that the Commission received and acknowledged evidence and argument that failure to exempt "executive, administrative and professional women" (IWC Wage Orders only applied to women and minors at that time) imposed a roadblock to advancement for employees in such positions. The minutes further state at p. 4 the intent of the Commission to include such exemptions in its Wage Orders using the federal criteria as a guide. See "Executive, Administrative, Professional...Outside Salesman Redefined" Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, United States Department of Labor, October 24, 1940, for the federal criteria in existence at the time of the inclusion of said exemptions by the IWC. The Wage Orders were later amended to apply to employees of both genders, see *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal. 3d 690, 700-701.

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Both the Fair Labor Standards Act and the Wage Orders promulgated by the Industrial Welfare Commission are remedial in nature. Accordingly, "[t]he employer bears the burden of proving an employee is exempt. (*Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196-197) Exemptions are narrowly construed against the employer and their application is limited to those employees plainly and unmistakably within their terms. (*Dalheim v. KDFW-TV* (5th Cir. 1990) 918 F.2d 1220, 1224.)" *Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562.

As I am sure you are aware, neither federal nor state agencies, when interpreting regulations relating to exempt status, nor courts hearing such matters, place any reliance on the job title, but focus on the actual job duties performed. "Titles alone are of little or no assistance in determining an employee's exempt or nonexempt status." *Freeman v. NBC* (S.D.N.Y. 1993) 846 F. Supp. 1109, 1115, *rev'd on other grounds*, 80 F.3d 78 (2nd Cir. 1996). "Titles can be had cheaply and are of no determinative value." 29 C.F.R. §541.201(b).

Thus, a determination as to whether an employee or group of employees are exempt or non-exempt from overtime provisions requires a thorough investigation as to the actual work performed by the employee(s). This is a fact intensive inquiry, and for this reason, the Division generally cannot issue a ruling as to the exempt or non-exempt status of any specific employee(s) without either conducting our own investigation or by ascertaining the relevant facts in an adjudicatory capacity through an evidentiary hearing. However, there are occasions when material facts are not in dispute, or when we are requested to set forth the Division's opinion in response to a statement of facts provided by the requesting party. Such opinion letters are authorized by statute as a means of providing guidance to the public, and may be considered by a court confronting a similar issue. (Labor Code section 1198.4; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 ["agencies may provide parties with advice letters, which are not subject to the rulemaking provisions of the APA."]; *Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal.4th 1 [discussing the degree of deference to be accorded by

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courts to agency opinion letters interpreting statutes or regulations].)

In your letter, you set forth the job duties of insurance company claims representatives as follows:

"This claims representative handles claims under personal (as opposed to commercial) auto insurance policies. In accordance with company guidelines setting forth estimating policies and procedures, he estimates the extent of auto damage and repair cost, in addition to allowable medical and related costs attendant to bodily injury claims sometimes filed in connection with a car accident. In the course of this claims processing, he passes along to the insurance company any information which may suggest potential fraud or which may provide the insurance company the opportunity to obtain reimbursement from another party to the accident ('subrogation'). Before closing a claims file, he must get higher approvals if the amount of the estimate exceeds the dollar authority level granted to him by the insurance company."

You ask two questions. First, you ask whether, in determining whether certain employees function in an "administrative" capacity, the DLSE would apply the same analysis as that applied under federal regulations; that is, would our analysis focus on whether the employees' job activities are "*directly related to management policies or general business operations*" or are "*production*" in nature. Second, you ask if the facts set forth in your letter would lead DLSE to conclude that the employees described therein are nonexempt because their duties demonstrate that they are engaged in "*production*" activities.

To answer your first question, California law is not identical to federal law on the issue of exempt status. The Fair Labor Standards Act provides, at 29 U.S.C. §213(a)(1), that the minimum wage and overtime provisions of the Act [29 U.S.C. §§ 206 and 207, respectively] do not apply to:

"Any employee employed in a bona fide executive, administrative, or professional capacity (including any

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employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)...."

Wage Order 4 [Section 1(A)] provides the following exemption for administrative, executive or professional employees:

"Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires the exercise of discretion and independent judgment, and for which the remuneration is not less than \$1,150 per month. . . ." ³ (emphasis added.)

As you can see, the language of the Fair Labor Standards Act differs somewhat from that of the IWC Wage Order. The FLSA simply requires that the employee be employed in an administrative capacity, while Wage Order 4 requires that the person be engaged in

³ The following subparagraph exempts employees engaged in various enumerated licensed professions, and employees engaged in occupations that are "commonly recognized as a learned or artistic profession." These exemptions are clearly inapplicable to insurance claims representatives.

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work which is primarily⁴ intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment.

The federal scheme allows the Secretary of Labor, through appropriate regulations, to define the terms used to describe exempt employees. The Department of Labor, which is headed by the Secretary of Labor, has promulgated such regulations at 29 C.F.R. §541 et seq. These regulations outline both the "long" and "short" tests of bona fide administrative employee status. Section 541.2(a) through (e) (the "long test") defines the term "employee employed in a bona fide administrative capacity" as being an employee:

(a) [w]hose primary duty consists of....

(1) the performance of ... office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers,and

(b) [w]ho customarily and regularly exercises discretion and independent judgment; and

(c) ... (3) [w]ho executes under only general supervision special assignments and tasks; and

(d) [w]ho does not devote more than 20 percent, or in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section...; and

(e) (1) [w]ho is compensated for his services on a salary or fee basis at a rate of not less than \$155 per week."

⁴ Section 2 of Wage Order 4 defines "primarily" to mean "more than one half of the employee's work time." In 1993, Wage Orders 4 and 5 were amended to provide a relaxed definition of "primarily" that is expressly limited to employees in the "health care industry."

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Section 541.214 (the "short test") provides:

"(a) Except as otherwise noted in paragraph (b) of this section, §541.2 contains a special proviso including within the definition of "administrative" an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week exclusive of board, lodging, or other facilities, and whose primary duty consists of either the performance of office or non manual work directly related to management policies or general business operations of the employer or the employer's customers,...where the performance of such primary duty includes work requiring the exercise of discretion and independent judgment. Such a highly paid employee having such work as his or her primary duty is deemed to meet all the requirements in §541.2 (a) through (e).

Thus the "short test" exempts employees who meet that test's higher salary threshold **AND** whose "primary duty" is "directly related to management policies or general business operations of the employer" (or the employer's customers) **AND** where such work requires the exercise of discretion and independent judgment.

The key difference between either federal test and the IWC Wage Order is the distinction between the federal focus on "primary duty" and the state focus on whether the employee is actually engaged in exempt work for more than half of the hours worked in the workweek. Unlike the strictly time-based definition of "primarily" contained in each of the IWC orders⁵, the federal regulations expressly provide that "time alone . . . is not the sole test", allowing for a finding of exempt status even "in situations where the employee does not spend over 50% of his time in [exempt] duties." 29 C.F.R. §§541.103, 541.206(b). In addition to this difference between the federal "primary duty" test and the state "primarily engaged in" test, the IWC orders (unlike the federal "long" and "short" tests) do not provide for a lower level

⁵ With the exception, as discussed above, of employees in the "health care industry" covered by IWC Orders 4 or 5.

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of scrutiny for higher compensated employees.⁶ These differences between state and federal law notwithstanding, the Division of Labor Standards Enforcement has traditionally followed federal cases and federal regulations, to the extent that such cases and regulations are not inconsistent with state wage and hour provisions, in interpreting and enforcing the various IWC wage orders, including Wage Order 4. Thus, in an opinion letter dated January 7, 1993, DLSE Chief Counsel H. Thomas Cadell explained:

"Again, in determining the exemption status under the administrative category, the key phrase is 'engaged in' and not, as under the federal regulations, 'primary duty' (29 C.F.R. §541.2(a)). With this exception, the DLSE accepts the general definition of 'administrative duties' set out by the DOL at 29 C.F.R. §541.2. Generally, administrative work must be nonmanual, related to management policies or general business operations of the employer or the employer's customers and must involve the customary and regular exercise of discretion and independent judgment. The Department of Labor's regulations discuss the administrative exemption in detail at 29 C.F.R. §541.201 through §541.208 and the DLSE adopts these definitions. However, it must be noted that certain of the regulations not contained within the above cited sections inconsistent with the IWC Orders and cannot be relied upon."⁷

29 C.F.R. §541.205 is thus one of the federal regulations that DLSE follows in enforcing the provisions of IWC Order 4. Section 541.205(a) defines the phrase "directly related to management policies or general business operations of [the employee's]

⁶ In contrast to the federal regulations, the IWC Orders do not set out different exemption tests for lower salaried and higher salaried employees. Order 4, for example, contains a threshold requirement of \$1,150 per month; that is, if the employee's salary falls below that amount, the employee, even if "primarily engaged in" administrative or executive duties, is non-exempt. As to employees whose salary is not less than this amount, no matter how highly compensated the employee may be, one set of criteria are applied in determining whether the employee is exempt or non-exempt.

⁷ For example, DLSE will not rely on federal regulations under which nurses may be considered exempt because the IWC has expressly provided that nurses are not exempt from coverage of Order 4. Likewise, the IWC has defined "teaching" in a manner that does not exempt certain teachers, thereby precluding reliance on federal regulations dealing with the exemption for teachers.

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employer or [the] employer's customers" as "those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work." Furthermore, Section 541.205(a) "limits the exemption to persons who perform work of substantial importance to the management or operation of the business of [the] employer or [the] employer's customers." Thus, in answer to your first question, DLSE uses the test set out at 29 C.F.R. §541.205 in determining the applicability of the administrative exemption under IWC Order 4. In other words, if an employee is primarily engaged in "production" or "sales" work, rather than in activities "directly related to management policies or general business operations," the employee does not fall within the administrative exemption from IWC Order 4's overtime requirements.

In response to your second question, it appears, based upon the description of duties set forth in your letter, that the insurance claims representatives described therein are not primarily engaged in activities "directly related to management policies or general business operations," and thus, are not exempt from overtime under Order 4. In reaching this conclusion, we rely upon federal regulations, subject to the limitations discussed above, and federal case law.⁸

Numerous courts have held that the "concept of 'production' in 29 C.F.R. §541.205(a)'s administrative/productive work dichotomy is not to be understood as covering only work involving the manufacture of tangibles. The concept is not limited to manufacturing activities. . . . [N]on-manufacturing employees may therefore be 'production' workers for purposes of the dichotomy." *Martin v. Cooper Electric Supply Co.* (3rd Cir. 1991) 940 F.2d 896, 903, cert den. 503 U.S. 936, 112 S.Ct. 1473 (1992). See also, *Reich v. State of New York* (3rd Cir. 1993) 3 F.3d 581 [holding that production/administrative dichotomy applies outside the manufacturing context, and that investigators employed by the State

⁸ "Federal interpretations of federal labor laws may provide persuasive authority for interpreting state law; with the persuasiveness of federal authority being less when the state law differs from the federal." *Aguilar v. Association for Retarded Children* (1991) 234 Cal.App.3d 21, 31. "Because the California wage and hour laws are modeled to some extent on federal laws, federal cases may provide persuasive guidance." *Nordquist v. Mc-Graw Hill Broadcasting Co.*, *supra*, 32 Cal.App.4th at 562.

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Police Bureau of Criminal Investigation, and who are responsible for conducting investigations, are engaged in non-exempt "production" work because investigations are part of a law enforcement agency's "product"].

"The distinction §541.205(a) draws is between those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." *Dalheim v. KDFW-TV* (5th Cir. 1990) 918 F. 2d 1220, 1230 (emphasis added). In applying §541.205, the Fifth Circuit held that news producers, directors and assignment editors were not exempt administrators because their work related to the "production" of the product being marketed by the employer, namely, the newscast, and had little or nothing to do with "setting business policy, planning the long- or short-term objectives of the news department, promoting the newscast, negotiating salary or benefits with other department personnel, or any of the other types of 'administrative' tasks noted in §541.205(b)."⁹ *Id.* at 1231. Thus rejecting the employer's argument that the term "production," as used in section 541.205(a) applied only to "blue collar manufacturing employees," the *Dalheim* court concluded that where the "product" which the enterprise exists to produce and market is a service, the employees whose work consists of providing that service are engaged in "production" and are not exempt administrative employees.

This analysis has become the touchstone of judicial determinations of exempt administrative status. Administrative activity, as defined at C.F.R. §541.205(b), "denotes employment activity ancillary to an employer's principal production activity, whether that be production of a 'commodity or commodities, . . . goods or services', see *Dalheim*, 918 F.2d at 1230, or [in the case of a wholesale distributor] production of wholesale sales." *Martin v. Cooper*, *supra*, 940 F.2d 896, 904-905 [holding that inside salespersons employed by a wholesale distributor are engaged in

⁹ 29 C.F.R. §541.205(b) provides, in relevant part, that "[t]he administrative operations of the business include the work performed by so-called white collar employees engaged in 'servicing' a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control."

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"production" within the meaning of section 541.205(a), that negotiating with customers in the course of making wholesale sales does not constitute administrative "servicing" of the business within the meaning of 29 C.F.R. §541.205(b), and thus, that such employees are non-exempt].

The Ninth Circuit applied this same analysis, in *Bratt v. County of Los Angeles* (9th Cir, 1990) 912 F. 2d 1066, cert. den. 498 U.S. 1086 (1991), in holding that county probation officers, who conducted investigations of adult offenders and/or juvenile detainees, and who advised the court as to appropriate sentencing or other case disposition, did not meet the test of performing work directly related to management policies or general business operations. The Court held that the essence of the distinction between activities "directly related to management policies" and those related to "production" was that between "the running of a business, and not merely . . . the day-to-day carrying out its affairs." *Id.* at 1070. The work of the probation officers at issue was held to involve the day-to-day carrying out of the business of the probation department, as opposed to the overall operational management or policies of that agency. The court further held that recommendations made by the probation officers as to appropriate sentencing did not relate to the operation of the courts or court policy, but merely served to provide information to be used by the courts in the exercise of the court's discretionary functions.

District courts applying this analysis have concluded that employees responsible for estimating or investigating insurance claims, when employed by businesses engaged in the estimation or investigation of such claims, are non-exempt "production" employees. In *Reich v. American International Adjustment Company* (D. Conn. 1994) 902 F.Supp. 321, 325, the court held that automobile damage appraisers employed by a business engaged in the appraisal of damage claims, who inspect vehicles, determine the extent of necessary repairs, estimate repair costs, and, when necessary, negotiate with body shops regarding repair costs "perform the day-to-day activities of the business . . . [and, therefore] do not administer the business of [the employer]." Similarly, in *Gusdonovich v. Business Information Company* (W.D. Penn. 1985) 705 F.Supp. 262, the court held that an investigator, employed by a company that investigates and collects information for insurance companies, and whose primary duty consisted of

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investigating insurance claims, was non-exempt because the employer's "business is 'producing' information for its clients, and the plaintiff's duties consisted almost entirely of gathering that 'product'." Thus . . . plaintiff was engaged in 'production' within the meaning of the regulation." *Id.* at 265.

Of course, this analysis requires us to look not only at the nature of the employee's work, but also at the nature of the employer's business. Investigators employed by a law enforcement agency are considered to be engaged in non-exempt "production" work (*Reich v. State of New York, supra*), while postal inspectors employed by the U.S. Postal Service have been held to be exempt "administrators" (*Sprague v. United States* (Ct. Cl. 1982) 677 F.2d 865). These seemingly conflicting results are easily explained. "[T]he business of the Post Office is delivering the mail. An employee who works for the Post Office in an investigatory role would not appear to be performing a line function in that organization." *Adam v. United States* (1992) 26 Cl. Ct. 782, 791 [holding that U.S. Border Patrol agents, whose duties include conducting investigations and preparing cases for prosecution, are non-exempt because these agents carry out the "end function of the Border Patrol"].

Thus, in *Haywood v. North American Van Lines, Inc.* (7th Cir. 1997) 121 F.3d 1066, the court held that an employee employed by an employer in the business of shipping household goods for consumers relocating within the United States or Canada, and whose job duties consist of negotiating and resolving billing disputes and customer claims regarding damages or delays concerning shipped goods, is not engaged in "production" activities within the meaning of 29 C.F.R. §541.205(a), but rather, is engaged in administrative activities by "servicing" the business within the meaning of section 541.205(b). The court explained that the defendant's "product" consists of moving household goods, and that plaintiff's duties are "ancillary to the production process of actually moving the household goods." *Id.* at 1071-1072. The court compared plaintiff's job functions to those of "claims agents" and "adjustors," job categories that are expressly mentioned in the federal regulations.

To be sure, 29 C.F.R. §541.205(c)(5) states that "many persons" employed as "advisory specialists and consultants of various kinds," including "claims agents and adjustors," meet

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"[t]he test of directly related to management policies or general business operations."¹⁰ In seeming contrast, 29 C.F.R. §541.205(c)(2) provides:

"An employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks.... An inspector, such as, for example, **an inspector for an insurance company**, may cause loss to his employer by the failure to perform his job properly. but such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be "directly related to management policies or general business operations" as that phrase is used in §541.2." (emphasis added.)

Taking into account, again, that it is the duties (or in state law, the work performed), rather than the titles, that determine exempt status, it would appear that the apparent conflict between subsections (c)(2) and (c)(5) of section 541.205 turns on the production/administration dichotomy. The types of employees listed at §541.205(c)(5) function as advisors either to the employer or the employer's customers, and the advice rendered concerns either the inner workings of the employer's business or the business affairs of the customer. A claims adjustor employed by an employer whose principal business is not that of handling claims is not engaged in production work, and falls under the ambit of section 541.205(c)(5). In contrast, the processing and resolution of claims constitutes the principal product of an insurance company, so that an insurance company claims adjustor is nothing more than a line worker, engaged in the "production" of his or her employer's

¹⁰ This reference to "claims agents and adjustors" is derived from the 1940 DOL Report which defined the "administrative" exemption. See fn. 2, *supra*. The Report did not expressly refer to **insurance company** claims agents or **insurance company** adjustors. The Report did give an example of a "claim agent for a large oil company," with authority to settle large claims, as an employee who would come within the administrative exemption. Obviously, such an employee is not engaged in the day-to-day "production" work of his or her employer. ("Executive, Administrative, Professional . . . Outside Salesman" Redefined, Report and Recommendations, October 24, 1940, at pp. 24-25.)

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principal product. An adjustor employed by an insurance company (as opposed to a claims adjustor employed by, for example, an oil company) cannot be said to be performing work that is "directly related to management policies or general business operations" or that is "of substantial importance to the management or operation of the business." For this reason, section 541.205(c)(2) tells us that an insurance company "inspector" is not engaged in exempt "administrative" work.

In the instant query, the product being marketed is the service which is attendant to the purchase of the policy of insurance. In other words, when the consumer is involved in an accident, the "service" rendered by the insurer is assessment of the damages and estimation of the cost of making the insured whole for the loss incurred, including diminution of that cost by passing on information obtained regarding the possible liability of third parties. In processing insurance claims, the insurance company claims representative is therefore engaged in producing the precise product or service that is sold by his or her employer to its customers. Such activities are not administrative in nature, within the meaning of the IWC Wage Order.

Your query further states that the claims representative also "passes along to the insurance company any information which may suggest possible fraud." In this regard, the insurance company claims representative functions in the same manner as the probation officers in *Bratt*. The transmittal of information as to which others will exercise discretion and independent judgment as to the course of action to be followed indicates the absence of discretion essential to the administrative exemption. Your stated facts also aver that to the extent an estimate exceeds the monetary limits set by the insurance company, the claims representative must seek approval from someone who has the authority to override such limits. This procedure suggests that the claims representative plays no role in setting such limits, and thus, does not perform exempt administrative "work of substantial importance to the management or operation of the business." We therefore conclude that the insurance company claims representatives described in your letter are not primarily engaged in work that is "directly related to management policies or general business operations of [their] employer or [their] employer's customers."

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Under IWC Order 4, the administrative exemption will not apply unless the employee receives the minimum required remuneration and "is engaged in work which is primarily intellectual¹¹, managerial, or creative and which requires exercise of discretion and independent judgement¹²." (emphasis added.) These requirements are expressed in the conjunctive; the absence of any one defeats the exemption.

The requirements for establishing the administrative exemption under the federal regulations are also expressed in the conjunctive. All five of the criteria set forth §541.2 must be met before an employee will be considered exempt under the federal "long test" and deprived of the protection of the FLSA. *Mitchell v. Williams* (8th Cir. 1969) 420 F.2d 67, 69. Most cases interpreting the regulations have focused on the first two requirements, found at section 541.2(a) and (b), which essentially correspond to the criteria under the "short test" discussed at 29 C.F.R. §541.214. The separate components of the "short test" have been held to be "analytically distinct," and thus, a determination that employees primarily function in a "production" capacity makes it unnecessary to also determine whether those employees exercise discretion and independent judgment. In other words, once it is determined that the employee's primary duty does not consist of "work directly related to management policies or general business operations of [the] employer or [the] employer's customers," further inquiry is unnecessary, and the employees will be found to be non-exempt. *Martin v. Cooper Electric Supply Co.*, *supra*, 940 F.2d at 907, fn. 10; *Bratt v. County of Los Angeles*, *supra*, 912 F.2d at 1071.

Consequently, we would conclude that the insurance company claims representatives described in your letter are not exempt without considering whether their work requires the exercise of

¹¹ The Wage Order does not define the term "intellectual" work. However, in view of the IWC's expressed intent to use the federal exemption criteria as guidance (see fn. 2, *supra*), this term can only be understood to embrace the requirements of 29 C.F.R. §541.2(a)(1), that is, within the meaning of the IWC Order, "intellectual work" is "office or nonmanual work directly related management policies or general business operations of [the] employer or [the] employer's customers."

¹² This requirement closely mirrors the language of 29 C.F.R. §541.2(b).

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discretion and independent judgment. However, we will take this opportunity to state that the Division, in determining whether an employee is primarily engaged in work that "requires exercise of discretion and independent judgment," within the meaning of the various IWC wage orders, would rely on the federal guidelines set out at 29 C.F.R. §541.207. Under that regulation, the employee, to be exempt, must have the authority or power to make independent choices "free from immediate direction and supervision, and with respect to matters of significance." (§541.207(a).) Moreover, "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." (§541.207(d)(1).) Also, to be exempt, the employee must exercise discretion and independent judgment "customarily and regularly." (§541.207(g).) Finally, the regulations warn:

"Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of §541.2. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard."

29 C.F.R. §541.207(c)(2).

Applying these criteria to the facts stated in your letter, we cannot conclude that the claims representatives customarily and regularly exercise discretion and independent judgment as to matters of significance. Indeed, insofar as claims must be handled "in accordance with company guidelines setting forth estimating policies and procedures", it would appear that the functions of the claims representative are best described by section 541.207(c)(2). Furthermore, the requirement that claims representatives obtain the approval from higher level employees when the amount of the

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estimate exceeds the "dollar authority level granted . . . by the insurance company," suggests that whatever discretion and independent judgment is exercised is confined to matters that are not substantial, and that the claims representatives do not have the authority to make independent choices, free from immediate direction and supervision, with respect to matters of consequence.

Thank you for your interest in California labor law. I trust the above addresses the matters raised by your inquiry. If you have any additional questions, please feel free to contact the undersigned.

Sincerely,

A handwritten signature in dark ink, appearing to read "Miles E. Locker". The signature is fluid and cursive, with the first name "Miles" and last name "Locker" clearly distinguishable.

Miles E. Locker
Chief Counsel

cc: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen

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